

ATTACHMENT

ITEM NO. X



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

SCWRCA

9-21-09

AUG 24 2009

Colonel Thomas H. Magness  
District Engineer, Los Angeles District  
U.S. Army Corps of Engineers  
PO Box 532711  
Los Angeles, California 90053-2325

Subject: Public Notice (PN) 2003-01264-AOA for the proposed Newhall Ranch Management and Development Plan, Los Angeles County, California

Dear Colonel Magness:

This letter is in response to your May 1, 2009 PN that describes the proposed Newhall Ranch Management and Development Plan for portions of the Santa Clara River and several adjacent tributaries, near the city of Santa Clarita, Los Angeles County, California. According to the PN, the applicant proposes to discharge dredged or fill material into approximately 82.3 acres of waters of the United States across the 12,000 acre project site.

The May 1, 2009 PN also provided notice of the publication of the Draft Joint Environmental Impact Statement and Environmental Impact Report (DEIS/DEIR) for the proposed project, pursuant to the National Environmental Policy Act (NEPA). EPA will provide comments on the DEIS in separate correspondence. The following comments were prepared under the authority of, and in accordance with, the provisions of the Federal Guidelines (40 CFR 230) promulgated under §404(b)(1) of the Clean Water Act (CWA). Our detailed comments on the project are enclosed.

Although the DEIS considered six separate alternatives to satisfy the requirements of NEPA, the PN did not provide information on how impacts associated with the proposed project have been avoided, minimized and compensated as required by 33 CFR 332.4(b)(1). Furthermore, the applicant has not yet prepared an 404(b)(1) Alternatives Analysis as required at 40 CFR 230.10(a). Therefore, we cannot determine whether the proposed discharge complies with the restrictions as specified in the Guidelines.

The Santa Clara River is Southern California's longest free-flowing river. The Santa Clara is home to 12 federally endangered plant and animal species and another 25 species of special concern. The river also supports an aquifer that provides drinking water to half of the residents in the Santa Clarita Valley. For these reasons, we are defining the Santa Clara River as an aquatic resource of national importance. Several of the drainages in the Newhall Ranch project area are significant tributaries to the Santa Clara River that provide important watershed functions (e.g., aquatic habitat, water and sediment supply).

and retention, and groundwater recharge). Modifications of these tributaries have the potential to cause adverse impacts to the Santa Clara River. Given the available information and the potential impacts to the Santa Clara River and its tributaries, EPA has determined that the project, as presently proposed, may result in significant and unacceptable impacts to aquatic resources of national importance and therefore recommends denial of the project. This letter follows the field level procedures outlined in the August 1992 Memorandum of Agreement between the EPA and the Department of Army, Part IV, paragraph 3(a) regarding §404(q) of the CWA.

Thank you for the opportunity to provide comments on this project. We look forward to working with the Los Angeles Corps District and the applicant to resolve the important environmental issues concerning the proposed project. If you wish to discuss this matter further, please call me at (415) 972-3572, or have your staff contact David W. Smith, Chief of our Wetlands Office, at (415) 972-3464.

Sincerely,

 24 Aug. 2009  
Alexis Strauss, Director  
Water Division

Cc:

Aaron Allen, North Coast Branch Chief  
U.S. Army Corps of Engineers, Los Angeles District  
Regulatory Branch – Ventura Field Office  
2151 Alessandro Drive, Suite 110  
Ventura, CA 93001

Diane Noda, Field Supervisor  
U.S Fish and Wildlife Service, Ventura Office  
2493 Portola Road, Suite B  
Ventura, CA 93003

L.B. Nye, Region Program Manager  
Los Angeles Regional Water Quality Control Board  
320 W. 4th Street, Suite 200  
Los Angeles, CA 90013

Ed Pert, Regional Manager  
California Department of Fish and Game  
South Coast Region  
4949 Viewridge Ave  
San Diego, CA 92123

Matt Carpenter, Director  
Environmental Resources  
Newhall Land and Farming Company  
23823 W. Valencia Boulevard  
Valencia, CA 91355

## **DETAILED PROJECT COMMENTS**

### **I. Project Description**

The Newhall Ranch Project is a master-planned development encompassing approximately 12,000 acres along the Santa Clara River ("the River") in unincorporated Los Angeles County. The applicant proposes to develop approximately 2,550 acres of the site for residential, commercial and industrial purposes. The applicant's proposed project includes the construction of 22,610 homes (in four separate villages), seven schools, a golf course, and a water reclamation plant.

The entire project area supports approximately 636 acres of waters of the United States, including 251 acres of wetlands, according to the preliminary jurisdictional determinations performed by the Corps to date. The majority of the jurisdictional waters on the site are located along the River. The site also includes several major tributaries that flow from the steep headwater areas down through the project to the River. As proposed by the applicant, the project would result in the destruction of approximately 82.3 acres of waters from direct discharges of fill material. Nearly 95% of the permanent impacts will occur in the ephemeral tributaries and small drainages that flow through the site. To create development areas, fill material from the surrounding upland areas would be placed into the valleys and canyons. New drainages and channels with grade control structures would be recreated on top of this fill material. Additionally, 59,845 linear feet of drainages would be converted to underground storm drain. Excluding the Salt Creek Open Area, the applicant proposes to fill approximately 79% of the natural tributaries on the project site.

### **II. Project Purpose**

A key issue is whether the Corps' adoption of applicant's project purpose – implementation of the Newhall Ranch Resource Management and Development Plan (RMDP) – as the overall project purpose will allow it to adequately consider practicable alternatives to the Project design under CWA section 404(b)(1).

EPA understands the Corps has not yet concluded its alternatives analysis pursuant to the CWA Section 404(b)(1) guidelines, and that the alternatives analysis is to be completed concurrently with the EIS/EIR on the broader Newhall Ranch Specific Plan (Specific Plan), of which the RMDP is described as a component, and will be provided as an appendix in the Final EIS/EIR.<sup>1</sup> EPA nevertheless believes it useful to provide our comments on the overall project purpose at this stage in the permit review process because the Corps acknowledges in its PN that this NEPA alternatives analysis will "provide the basis for the 404(b)(1) alternatives analysis."<sup>2</sup> Thus, EPA anticipates the

---

<sup>1</sup> RMDP-SCP EIS/EIR, (Executive Summary) ES-12.

<sup>2</sup> PN at 5 ("To satisfy the requirements of NEPA and provide the basis for the 404(b)(1) alternatives analysis, a total of six alternatives are being considered .... In consideration of the 404(b)(1) Guidelines, the five project alternatives were designed to increase the level of avoidance and minimization of impacts to waters of the United States, including wetlands.")

Corps' adoption of the overall project purpose in this EIS/EIR will likely be consistent when the Corps completes its 404(b)(1) analysis.

Pursuant to the 404(b)(1) Guidelines, there is a rebuttable presumption that practicable alternatives that do not involve special aquatic sites or are not water dependent are presumed to be available and "presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise."<sup>3</sup> The Corps' burden in finding the least environmentally damaging practicable alternative under the CWA Guidelines is "heaviest" for non-water dependent projects planned for a special aquatic site, such as a wetlands area. Because of this heavy presumption, the Corps may not issue a 404 permit unless the applicant, with independent verification by the Corps, provides detailed, clear and convincing information proving that an alternative with less adverse impact is "impracticable."

The Corps is required to take the applicant's purpose into adequate regard, and may consider local plans, such as the Specific Plan approved by the Los Angeles County Board of Supervisors in 2003, in its decision-making. On the other hand, the Corps must ensure that the overall project purpose is not so narrow that it constrains the alternatives analysis performed pursuant to the 404(b)(1) Guidelines.

From an overall review of the planning documents the applicant's overall project purpose may best be described as development of a master-planned community.<sup>4</sup> As such, it is not water dependant but does contain special aquatic sites, e.g., the alkali marsh areas in Potrero Canyon.<sup>5</sup> The EPA thus encourages the Corps to steer the project toward alternatives that do not involve discharges into these special aquatic sites. Currently, all of the applicants' build alternatives would impact special aquatic sites to some degree. Only Alternative 7 shows avoidance of most impacts.

EPA is concerned the DEIS relies on an overall project purpose that is narrowed to a development consistent with implementation of the RMDP.<sup>6</sup> While the RMDP is described as a "a conservation, mitigation, and permitting plan for sensitive biological resources",<sup>7</sup> the applicant acknowledges that "[t]he RMDP also includes development-related infrastructure projects in the Santa Clara River and its tributary drainages that are

---

<sup>3</sup> 40 C.F.R. § 230.10(a)(3).

<sup>4</sup> RMDP-SCP EIS/EIR, ES-10 ("The [RM&D Plan] would allow for the build-out of about 5.5 million square feet of commercial uses on 258 acres, and the development of approximately 643 acres devoted to uses such as community parks, neighborhood parks, a golf course, a community lake, new elementary, junior high and high schools, a library, electrical substation, fire stations, and a 6.8 million gallon per day water reclamation plant.")

<sup>5</sup> RMDP-SCP EIS/EIR, 4.6-8, 11.

<sup>6</sup> RMDP-SCP EIS/EIR, ES-11. ("The overall purpose/objective of the Project is to implement the approved Newhall Ranch Specific Plan, and thereby help to meet the regional demand for jobs and housing in Los Angeles County; and, at the same time, implement the [RM&D Plan] to address the long-term management of sensitive biological resources and develop infrastructure needed to implement the approved Specific Plan.") (emphasis added).

<sup>7</sup> RMDP-SCP EIS/EIR, ES-1.

needed to implement the approved Specific Plan.”<sup>8</sup> The DEIS further provides that “[i]f the [RMDP] is approved ... development associated with the approved Specific Plan would be facilitated.”<sup>9</sup> Consequently, EPA believes that a more accurate description of the overall project purpose would encompass these broader plans as set forth in the Specific Plan. A broader statement of purpose, such as “construction of a large scale, high density housing and commercial project” might suffice.

### **III. Mitigation Sequencing**

The basic premise of the 404 permitting program is that no discharge of dredged or fill material into waters of the United States shall be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment, or (2) the discharge would cause the nation’s waters to be significantly degraded. In order for a project to be permitted, it must be demonstrated that, to the extent practicable, steps have been taken to avoid impacts to wetlands and other aquatic resources, potential impacts have been minimized, and compensation will be provided for any remaining unavoidable impacts. This process is commonly referred to as the mitigation sequencing requirement of the 404 regulatory program.

Avoidance is the first step in the sequencing process by which the Corps determines whether or not the applicant’s proposed project is the least environmentally damaging practicable alternative (LEDPA). The Guidelines state:

*...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences.*

Seven alternatives were analyzed in the DEIS jointly issued by the Corps and the California Game and Fish Department (CDFG), with varying levels of avoidance and impacts analyzed in accordance with the NEPA. The applicant’s preferred NEPA alternative (Alternative 2) in the EIS would result in the greatest amount of permanent impacts (82.3 acres) and does not appear to follow the sequencing process. EPA strongly believes that further avoidance of waters of the United States is necessary prior to formulation of the LEDPA.

### **IV. 404 (b)(1) Alternatives Analysis & Determination of the LEDPA**

Although both NEPA and Section 404 require a range of alternatives be considered and analyzed during the environmental process, the requirements of the different regulations differ slightly. NEPA regulations require that an EIS rigorously explore and objectively evaluate “all reasonable alternatives,” while the 404(b)(1) Guidelines require the consideration of “practicable” alternatives. The Guidelines define “practicable” as available and capable of being done, taking into account cost, existing technology, and

---

<sup>8</sup> RMDP-SCP EIS/EIR, ES-6.

<sup>9</sup> RMDP-SCP EIS/EIR, ES-9.

logistics. Although the DEIS examined five additional project alternatives that had permanent impacts ranging between 11.4 acres in Alternative 7 to 71 acres in Alternative 3, it is unclear at this point whether these alternatives are "practicable" under Section 404.

From discussions with your staff, we understand that the applicant has not finished preparing the 404(b)(1) Alternatives Analysis for the proposed project. It has long been the position of EPA Region 9, that in order for the analysis of practicable alternatives under Section 404 to serve its intended purpose as a planning and screening tool, the analysis must be applied by potential permit applicants as early in the planning phases of their projects as possible. EPA would like the opportunity to review and provide comments on the 404(b)(1) alternatives analysis when this document becomes available.

The NEPA process includes alternative development and analysis leading to the identification and selection of a preferred alternative. However, the NEPA preferred alternative must also be considered the LEDPA for the Corps to proceed with authorization under the CWA. The LEDPA, as defined in 40 CFR Part 230.10(a), is the alternative with the least impacts to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

#### **V. Aquatic Resources of National Importance**

The Santa Clara River is an Aquatic Resource of National Importance (ARNI) because it is Southern California's longest free-flowing river and is home to 12 federally endangered plant and animal species plus another 25 species of special concern. The River also supports an aquifer that provides drinking water to half of the residents in the Santa Clarita Valley.

The impacts to the River may be significant and unacceptable. First, the applicant's proposed Project alternative (as provided in the DEIS) would result in a net loss of 157 acres of the River's FEMA 100-year floodplain (as well as nearly 4.43 acres of permanent impacts to the River itself associated primarily with bridge crossings).<sup>10</sup> This would result partially due to major fill to raise existing floodplain elevations out of the designated FEMA floodplain. DEIS significance criteria for flooding focuses on the potential for the project alternatives to increase flood hazards and does not include impacts to the River's floodplains themselves. The Presidents' Floodplain Management Executive Order 11988<sup>11</sup> was adopted to avoid impacts associated with the occupancy and modification of floodplains. The Order specifically states that federal agencies shall provide leadership to preserve the natural and beneficial values of floodplains. While still only in draft form, a newly proposed Floodplain Management Executive Order states that federal agencies must strengthen their commitment to protecting and restoring the

---

<sup>10</sup> RMDP-SCP EIS/EIR 4.6-51.

<sup>11</sup> Executive Order 11988 Floodplain Management (42 FR 26951), May 24, 1977

natural resources and functions of floodplains.<sup>12</sup> It also includes a provision that federal agencies “shall avoid placing fill in the floodplain to achieve flood protection to the extent practicable.” The EPA considers the loss of 157 acres of FEMA floodplain to be inconsistent with the intent of the adopted and draft Floodplain Management Executive Orders.

Second, the applicant’s proposed Project alternative poses significant and potentially unacceptable impacts to the River as result of proposed impacts to the River’s ephemeral and intermittent streams and tributaries, which provide a wide range of functions that are critical to the health and stability of the River. These tributaries provide hydrologic connectivity within the watershed, linking ephemeral, intermittent, and perennial stream segments, thereby facilitating the movement of water, sediment, nutrients, debris, fish, wildlife, and plant propagules throughout the Santa Clara watershed. In general, the processes that occur during ephemeral and intermittent stream flow include dissipation of energy as part of natural fluvial adjustment, and the movement of sediment and debris. Ephemeral and intermittent streams are responsible for a large portion of basin ground-water recharge in arid and semi-arid regions such as this one through channel infiltration and transmission losses. These stream systems contribute to the biogeochemical functions of the River and its watershed by storing, cycling, transforming, and transporting elements and compounds.<sup>13</sup>

Ephemeral and intermittent streams also support a wide diversity of plant species, and serve as seed banks for these species. Because vegetation is more dense than in surrounding uplands, ephemeral and intermittent streams provide habitat, migration pathways, stop-over places, breeding locations, nesting sites, food, cover, water, and resting areas for mammals, birds, invertebrates, fish, reptiles and amphibians. Here, as in other arid and semi-arid regions, the variability of the hydrological regime is the key determinant of both plant community structure in time and space and the types of plants and wildlife present in the ephemeral and intermittent streams at issue, as well as the River itself.

Ephemeral and intermittent streams in arid and semi-arid regions have distinctly different characteristics from perennial streams that are in wetter, more humid (mesic to hydric) environments. These complex systems have developed in a climatic regime of wide fluctuations of precipitation, ranging from drought to flood. Anthropogenic uses, such as urbanization, superimposed on that climatic regime can exacerbate or ameliorate their effects on soils and vegetation, and may affect hydrologic and ecological functions throughout the watershed. Stability and resiliency to disturbance are important for ecological integrity, but because of the deficiency of water, terrestrial arid and semi-arid region ecosystems do not recover quickly from human-imposed disturbance. Thus, EPA

---

<sup>12</sup> See the Environment & Energy Publishing, LLC website for a copy of the proposed draft Executive Order 11988 found online at:

[http://www.eenews.net/public/25/11835/features/documents/2009/07/21/document\\_gw\\_01.pdf](http://www.eenews.net/public/25/11835/features/documents/2009/07/21/document_gw_01.pdf)

<sup>13</sup> See Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*. U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.



would expect the amount and scope of permanent fill proposed by the applicant to significantly impact the hydrologic and ecological functions of the ephemeral and intermittent streams at issue, as well as the River itself.

Relatively intact low-order ephemeral streams with adequate buffers, such as the ones proposed to be filled by the applicant, perform a diversity of hydrologic, biogeochemical and habitat support functions that directly affect the integrity and functional condition of higher-order waters downstream, such as the River. Collectively, ephemeral and intermittent tributaries serve as the filtering headwaters for the primary sources of drinking water, and their coarse beds allow water infiltration that recharges groundwater aquifers. Healthy ephemeral waters with characteristic plant communities control rates of sediment deposition and dissipate the energy associated with flood flows to, e.g., downstream waters such as the River. The loss of these waters results in increased need for costly and often environmentally undesirable flood control facilities (such as the one proposed by the applicant for the River), as well as the increased need for drinking water and wastewater treatment infrastructure.

The goal of the CWA is to maintain and restore the physical, chemical, and biological integrity of the nation's waters. Ephemeral streams constitute a critical component of stream, river, and wetland systems throughout the United States, especially in the arid west where ephemeral systems are the primary characteristic of many watersheds. These systems provide important services, both to public health and the economy that our region depends upon. Impacts to ephemeral streams have largely been either unmitigated or mitigated out-of-kind, and a significant loss of headwater streams in many watersheds of the arid southwest has incrementally occurred. Ephemeral streams are, more than ever, of critical value regionally, and their support of human health and the economies of the west underscore their national importance.

In short, the Newhall Ranch project, as it is currently described in the PN, poses significant and unacceptable impacts to the River because it permanently removes much of the River's floodplain, and because the Project will both cause and contribute to the significant degradation and/or elimination of functions and values of the reach of the River that flows through the Project area by permanently impacting a significant portion of its tributaries, including Potrero Canyon, the impacts to which are discussed specifically below. The range and severity of environmental consequences resulting from the Newhall Ranch project to the River's aquatic environment are substantial and unacceptable and are contrary to the goals of the CWA.

## **VI. Potrero Canyon**

EPA is particularly concerned about the applicant's proposed development and impacts to Potrero Canyon, a River tributary, where 40% (32.73 acres) of the permanent impacts to aquatic resources from the proposed project will occur. According to the DEIS, Potrero Canyon contains 37.9 acres of waters of the United States including 6.52 acres of wetlands. The wetlands in Potrero Canyon include a rare, difficult to replace cismontane alkali marsh located in the lower portion of the Canyon. The 404 regulations establish a

rebuttable presumption that, "where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem."

Under the applicant's preferred proposed project, nearly all of stream channel that flows through Potrero Canyon will be placed under 6 to 25 feet of fill material and a new channel will be constructed on top of this material. The new channel will be bound by 32,530 linear feet (lf) of buried bank stabilization and will include 98 grade control structures and 5 bridge crossings. In addition, 10,918 lf (7.15 acres) of the stream in the headwater areas will be converted to underground storm drain. The wetland at the downstream end of Potrero Canyon would likely become hydrologically isolated from the active stream system and would likely not persist due to this interruption.

According to the results from the Hybrid Assessment of Riparian Condition (HARC) that was conducted on 57 stream reaches and across the study area (including the Santa Clara River), Potrero Canyon had the highest average HARC total score (.82) of all the major drainages (including the Santa Clara River). This score is even higher than the Salt Creek Open Area that had been used as a reference site for many of the geomorphic assessments. Using the post-project assumptions that were developed for the HARC, after implementation of the applicant's proposed project, Potrero Canyon will lose 15.86 HARC Average Weighted Total Score Units. Although the Corps has proposed to mitigate for this loss elsewhere in the project area (at Salt Creek and/or along the Santa Clara River), under the mitigation ratios specified in Mitigation Measure BIO-2 of the DEIS, the CDFG would require 74.91 acres of mitigation for the impacts to Potrero Canyon. After construction of the new channels, there would remain a deficit of 52.8 acres that would be mitigated through creation, preservation, enhancement of jurisdictional areas at an off-site location.

EPA strongly believes that further avoidance is necessary in Potrero Canyon since it will be difficult, if not impossible to replace and mitigate for both the lost cismontane alkali wetland and the ephemeral tributary in this area. The Corps has not yet provided the science or evidence of prior experience that is required to support the conclusion that the new streams would replace the functions and values of the wetlands and tributaries proposed to be filled and buried.<sup>14</sup> We are also concerned about the sustainability of creating ephemeral streams on top of fill material, since the survival of the riparian vegetation may not persist as it will be further separated from existing groundwater supplies. Most importantly, we are concerned about the impacts to the River caused by the potential loss of these special aquatic sites in Potrero Canyon for the reasons discussed in Section IV above.

---

<sup>14</sup> Ohio Valley Environmental Coalition v. USACOE, 479 F. Supp. 2d 607, 65 ERC 1234 (S.D.W.V. 2007) (Corps was arbitrary and capricious to conclude that mitigation plan that would replace filled stream with artificial streams called for a finding of no adverse impacts where Corps had no science or prior experience to support conclusion that artificial streams constructed out of abandoned sediment ditches would replace the functions and values of the headwaters systems being destroyed)

## **VII. Summary**

Prior to granting a permit pursuant to Section 404 of the CWA, the Corps must determine that the project complies fully with EPA's 404(b)(1) Guidelines and the project is not contrary to the public interest.

At this point, there is not sufficient information to determine whether the proposed discharge complies with the substantive requirements in the regulations related to alternatives analysis, water quality, endangered species, significant degradation, and/or mitigation. Based on the information presented to date, the applicant has not demonstrated that the project complies with any of the restrictions to discharges under the Guidelines.

Once the applicant completes a 404(b)(1) alternatives analysis for the proposed project, EPA would like the opportunity to review and provide comments on this document. We must therefore reaffirm our conclusion that there is presently insufficient information to make a finding of compliance, and we urge you to deny the application.